Supreme Court, U. S.
FILED
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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1979

No. 79-1614

WILMA CHARLENE RILEY,
Administratrix of the Estate of
EDWARD RILEY, Deceased,
WILMA CHARLENE RILEY, Spouse,
JENNIFER CHRISTINE RILEY, Daughter,
MELANIE GAEL RILEY, Daughter,
ALLISON MEGAN RILEY, Daughter,
DEANNA CHARLENE RILEY, Daughter,
Petitioners,
vs.
DEPARTMENT OF TRANSPORTATION,
FEDERAL AVIATION ADMINISTRATION,
UNITED STATES OF AMERICA,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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April, 1980

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1979

No._____

WILMA CHARLENE RILEY, et al	)
	)
Petitioners,	)
	)
vs.	)
	)
DEPARTMENT OF TRANSPORTATION,	)
FEDERAL AVIATION	)
ADMINISTRATION, and	)
UNITED STATES OF AMERICA	)
	)
Respondents.	)

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

The petitioners, Wilma Charlene Riley, et al, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit entered in this proceeding on January 17, 1980.

OPINION BELOW

The opinion of the Court of Appeals is contained in an Unpublished Order Not to be Cited Per Circuit Rule 35, and the same appears in the Appendix hereto. The opinion of the United States District Court for the Southern District of Indiana, Indianapolis Division, is contained in its Entry dated March 20, 1979, and appears in the Appendix hereto.

JURISDICTION

The judgment of the United States Court of Appeals for the Seventh Circuit was entered on January 17, 1980; and this petition for certiorari was filed within ninety days of that date. The jurisdiction of this Court is invoked under the provisions of 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

Did the Court below err by holding that plaintiffs' status, being derivative from a member of the military, denied her the right to bring an action under the Federal Tort Claims

Act, and further err by holding that the status of the tortfeasor, a non-immune Federal agency, is undeterminative of whether or not a suit may lie?

Is the lower Court's holding arbitrary and unreasonable on the facts of this case thereby denying petitioners equal protection of the law as guaranted by the Due Process Clause of the Fifth Amendment to the United States Constitution?

Is the holding of the Court below irreconcilable with this Court's holding in Feres vs. United States when all of the facts of Feres are compared with all the facts of Riley?

CONSTITUTIONAL AMENDMENTS AND STATUTES INVOLVED

Constitution of the United States, Amendment 5

28 U.S.C. 1254 (1)

28 U.S.C. 1346 (b)

28 U.S.C. 2671

28 U.S.C. 2674

28 U.S.C. 2680

49 U.S.C. 1301

49 U.S.C. 1303

49 U.S.C. 1343

STATEMENT OF THE CASE

Procedural History

The plaintiffs filed their action pursuant to 28 U.S.C. Subsections 1346 (b) and 2671, et seq., seeking damages for the death of a military pilot killed while flying a military aircraft along a civilian airway which was subject to exclusive civilian control.

The defendants filed a Motion to Dismiss asserting that plaintiff, Wilma C. Riley, failed to state a claim for which relief might be granted; that plaintiffs, Jennifer Christine Riley, Melanie Gael Riley, Allison Megan Riley, and Deanna Charlene Riley, failed to comply with the jurisdictional prerequisites to bringing suit; and, as a consequence, the District Court lacked jurisdiction to hear their claim; and,

finally, that the defendants, Department of Transportation and the Federal Aviation Administration, were not proper parties to the lawsuit.

The defendants sought and obtained a protective order preventing plaintiffs from proceeding with discovery depositions which they were attempting to take pending the Court's ruling on Defendant's Motion to Dismiss.

Plaintiffs filed an Amended Complaint and a response to the defendants' original Motion to Dismiss contending that they were not barred from bringing their action under the Federal Tort Claims Act in that plaintiffs' action was predicated upon the intentional misconduct and/-or willful neglect of a non-immune civilian governmental agency whose relationship with the decedent was non-military and whose actions were not acts which constituted activity incident to his military service. Plaintiffs further contended they had substantially complied with

the notice requirement to the Federal Aviation Agency and the Department of Transportation and that these defendants had been named as defendants to clearly delineate the action as being one pursued against civilian agencies not immune under the terms of the Federal Tort Claims Act.

The District Court deemed the government Motion to Dismiss refiled as to the Amended Complaint and granted the defendant's Motion to Dismiss citing as authority the holding in Feres vs. United States, 340 U.S. 135, 95 L.Ed. 152 (1950).

On appeal, the Circuit Court of Appeals for the Seventh Circuit affirmed the District Court's ruling, again citing as authority the holding in Feres. The Court held that it is the status of the injured rather than that of the tortfeasor which determines who may bring a suit. The Honorable Edward Dumbauld, Senior District Judge, in a concurring opinion, stated

that but for a previous holding by the Seventh Circuit reaching the same result, he would have dissented in this case. He further stated that in his judgment the status of the tortfeasor should be controlling but that "the question is open insofar as decisions of the Supreme Court are concerned."

Facts of Riley

Petitioners' action against the defendants herein is predicated upon the acts of willful neglect and intentional misconduct perpetrated by civilian employees of the Federal Aviation Administration, who at the time of decedent's death were exercising exclusive civilian control over the civil airway being flown by the decedent.

The facts of plaintiffs' case reveal that at the time of the decedent's death he was a United States Air Force pilot on active duty flying a military aircraft and was on a military mission. The aircraft controllers were located

at purely civilian locations and were not subject directly or indirectly to military authority. Their function is clearly delineated by 49 U.S.C. Subsections 1301, et seq.

In a five-minute period immediately preceding decedent's fatal collision with a mountain, he was subject to the exclusive control of civilian air route traffic controllers who were performing non-immune civilian Federal activities. At 0123:37Z ("Z" denotes Greenwich time) the decedent, Captain Riley, reported to the Atlanta Center that he was blocking 25,000—26,000 M.S.L. (mean sea level) altitude. At 0123:38Z Atlanta Air Route Traffic Control Center acknowledged that communication. From that point in time up until the time of impact, stated to be at 0154:34Z time, either the Atlanta Air Route Traffic Control Center or the Indianapolis Air Route Traffic Control Center were in exclusive civilian control of the subject

aircraft as it related to its flight path over and above the terrain.

According to the United States Air Force Collateral Investigation Report issued by the investigator on March 10, 1977, the decedent's aircraft tracked normally and complied with route corridor and IFR altitudes until reaching a destination point denominated "19." This point appears on the Vertical Flight Profile, ARTCC. At said point, the aircraft descended to 6,700 feet M.S.L. The required IFR route structure altitude at that point was 7,700 feet M.S.L. Decedent's aircraft then descended to 4,700 feet M.S.L., and at that time the required IFR route structure was 6,700 feet M.S.L. FAA records disclose that the decedent herein reported to the Indianapolis Center as being "level 4,700." This call at 0150:59Z was made approximately four and one-half (4 1/2) minutes early. At the time the call was made to the Indianapolis Center, Captain Riley was still

subject to the Atlanta Control Center and was not scheduled to be handed off by them to the Indianapolis Center until approximately 0155:30Z. Both centers were aware of this.

At this time controllers at both the Indianapolis Air Route Traffic Control Center and the Atlanta Air Route Traffic Control Center had actual radar contact with the decedent's aircraft and knew as a matter of fact the decedent was confused, anxious, had descended early, and was flying at an altitude below the highest terrain in the immediate vicinity of said aircraft. In addition, said controllers also knew the actual altitude of decedent's aircraft by way of signals being received from the aircraft's encoding altimeter, which signals were being displayed on the controller's radar screens. In spite of being in possession of all this information, the defendant controllers did nothing. As a result, and though the defendants had the "last, clear chance" for at least four

and one-half (4 1/2) minutes prior to impact, no inquiry was made nor warning given; and decedent's aircraft was allowed to fly into the mountain.

REASON FOR GRANTING THE WRIT

The Decision Of The Seventh Circuit Is Unconstitutional And Conflicts With This Court's Decision In Feres vs. United States For The Reason That The Court Held The Status Of The Plaintiff And Not That Of The Tortfeasor Determines The Right To Bring An Action Under The Tort Claims Act. By So Holding, The Seventh Circuit Has Violated Title 28 U.S.C. 2674 And Has Decided An Important Question Of Federal Law Which Has Not Been, But Should Be, Settled By This Court.

A plaintiff's right to bring an action against the United States Government under the Federal Tort Claims Act is determined solely by the provisions set forth in 28 U.S.C., Subsection 2674, as limited by 28 U.S.C., Subsection 2680.

Subsection 2674 states in part as follows:

> The United States shall be liable respecting the provisions of this title relating to Tort Claims, in the same manner and to the same effect as

> a private individual under like circumstances."

Subsection 2680 of the act sets forth certain enumerated exceptions to the liability created by Subsection 2674. Consequently, both must be read in conjunction with one another in order to determine the government's potential liability for a tort claim. The Act is specific in this regard, and this Court's ruling in Feres followed Subsection 2674 to the letter.

The lower Court's holding, that it is the status of the plaintiff that controls, is repugnant to this section and conflicts with this Court's decision in Feres. Nowhere in Feres is there authority for such ruling. Quite the contrary, the final conclusion reached by this Court in Feres, was reached as the result of a thorough analysis of the status of the Government as respondeat superior in its military capacity and its relationship to members of the armed forces.

In deciding Feres, this Court, found the common fact underlying the three cases was that "each claimant, while on active duty and not on furlough, sustained injury due to negligence of others in the armed forces." This Court then went directly to the "obvious shortcoming" of their claims." (95 L.Ed. 152 at 156). This Court, mindful of Subsection 2674 and "the test of allowable claims," (emphasis supplied) stated:

> "Plaintiffs can point to no liability of a 'private individual' even remotely analogous to that which they are asserting against the United States. We know of no American law which ever has permitted a soldier to recover for negligence, against either his superior officers, or the government he is serving. Nor is there any liability 'under like circumstances' for no private individual has power to conscript or mobilize a private army with such authorities over persons as the government vests in echelons of command." (95 L.Ed. 152 at 158).

The reasoning of this Court clearly establishes that "the test of allowable claims"

was not met for reasons that were obvious. The plaintiffs in the Feres case were military persons seeking recovery from the government as respondeat superior for the negligent acts committed by others in the military service. This Court found a total lack of legal precedent allowing such an action. This Court reasoned that under the unequivocal dictates of Subsection 2674, there could be no liability under "like circumstances" for the reason that no "private individual" had ever had the authority to maintain an army. As a consequence, their claims were understandably held not to be allowable claims under this Subsection.

This Honorable Court, in deciding Feres, further found that liability, if any, assumed by the government "is that created by all the circumstances." (Emphasis supplied.) (95 L.Ed. 152 at 159). Again, by so stating, it is clear that this Court held that the status of the

tortfeasor and the relationship to the plaintiff was determinative in meeting the test prescribed by Subsection 2674.

Other factors were considered by the Court in arriving at its ultimate decision in Feres. It becomes clear in reading this Court's opinion, that all were viewed in the perspective of the government being the military respondeat superior to a military plaintiff. The opinion establishes this as fact. The arguments advanced by the Special Assistant to the Attorney General, Newell A. Clapp, in his argument and brief to this court, stated that that was the government's contention as well. Mr. Clapp stated:

> "The United States accepted liability only for the negligent acts of its employees, acting within the scope of their employment in circumstances where the United States, if a private person would be liable. In other words, its only liability under the Act is that which could be imputed to it under the doctrine of respondeat superior.
>
> * * * *

> If the party who actually causes the injury is free from civil liability, it is obvious that 'his employer must also be entitled to a like immunity.' Accordingly, under the Federal Tort Claims Act, if the act of the Federal employee, whose negligence is alleged, would cast no personal legal responsibility upon him, it follows that no responsibility can attach to the United States as his employer." (95 L.Ed. 152 at 155).

These arguments, viewed in light of this Court's reasoning as set forth in Feres, makes it patently obvious that this Court did not focus on the status of the plaintiff nor imply by its ruling that plaintiffs' status solely determined the right to bring an action pursuant to Subsection 2674 of the Act.

It is significant to note the concurring opinion of the Honorable Edward Dumbauld, Senior District Judge for the Seventh Circuit, in Riley's case. Though Judge Dumbauld concurred, he did so only for the reason that the Seventh Circuit had reached the same result in Layne vs.

United States, 295 F.2d 433 (C.A. 7 1961). Judge Dumbauld stated:

> "It seems clear to me that the status of a tortfeasor, not that of the plaintiff, is controlling with respect to liability under the Federal Tort Claims Act. I disagree with the contrary conclusion reached by the Ninth Circuit in Uptegrove vs. United States, 600 F.2d 1248 at 1249 (C.A.9 1979) . . . In my judgment the question is open insofar as decisions of the Supreme Court are concerned."

In Uptegrove the Ninth Circuit cited their previous holding in United States vs. Lee, 400 F.2d 558 (C.A. 1968) as authority. In deciding Lee, the Ninth Circuit stated:

> "The Supreme Court and Circuit Court cases are consistent in holding that the status of the deceased or injured person controls. If his injury or death was connected with the military, the claimant may not recover under the Tort Claims Act."

The above quotation, taken directly from Lee, is unsupported by any authority whereby the Ninth Circuit arrived at that conclusion. As so succinctly stated by Judge Dumbauld in the Riley

case, there are no U.S. Supreme Court cases which support such a proposition.

Under the facts of Riley, plaintiffs brought an action against the United States Government for the negligence of governmental civilian air route traffic controllers whose activities are not immune pursuant to Subsection 2680, of the Federal Tort Claims Act. As the status of the government in this case renders it liable "in the same manner and to the same effect as a private individual under like circumstances" as mandated by Subsection 2674 of the Act, the "test of allowable" claims is met. Under these facts this Court's decision in Feres does not bar your petitioners' right to bring their action.

Petitioners argue that the lower courts have been unreasonable and arbitrary to such an extent as to violate the right of the petitioners to equal protection of the law as encompassed in the due process provision of the

Fifth Amendment to the United States Constitution. Such holding violates the specific terms of the Federal Tort Claims Act which waive immunity of the Federal Government under the facts of this case.

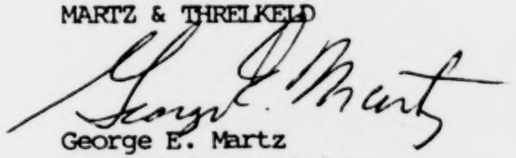
CONCLUSION

The holding of the lower court, in effect, unconstitutionally rewrites Subsection 2674 of the Federal Tort Claims Act. Lacking any authority from this Court's previous rulings, it emasculates the right of a military plaintiff to pursue a statutory tort action against the government for negligence committed in the performance of a non-immune civilian activity. Such holding denies the military plaintiff equal protection of the law as encompassed in, and guaranteed by, the Fifth Amendment Due Process Provision. In addition, as the holding clearly conflicts with this Court's holding in Feres, the decision reached by the Seventh Circuit should be reversed.

WHEREFORE, petitioners pray that a writ of certiorari be issued to review the judgment and opinion of the Seventh Circuit.

Respectfully submitted,

MARTZ & THRELKELD



George E. Martz
Counsel for petitioners

April, 1980

APPENDIX

UNITED STATES CONSTITUTION

AMENDMENT 5

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment by a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself; nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

28 U.S.C. § 1254. Writs of Certiorari

Courts of appeals---Certiorari---Appeal---Certified questions.---Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

28 U.S.C. § 1346. United States as defendant

. . . .

(b) Subject to the provisions of chapter 171 of this title, the district courts, together with the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

. . . .

28 U.S.C. § 2671. Definitions

As used in this chapter and sections 1346(b) and 2401(b) of this title, the term "Federal agency" includes the executive departments, the military departments, independent establishments of the United States, and corporations primarily acting as instrumentalities or agencies of the United States, but does not include any contractor with the United States.

"Employee of the government" includes officers or employees of any federal agency, members of the military or naval forces of the United States, and persons acting on behalf of a federal agency in an official capacity, temporarily or permanently in the service of the United States, whether with or without compensation.

"Acting within the scope of his office or employment", in the case of a member of the military or naval forces of the United States, means acting in line of duty.

28 U.S.C. § 2672. Administrative adjustment of claims

The head of each Federal agency or his designee, in accordance with regulations prescribed by the Attorney General, may consider, ascertain, adjust, determine, compromise, and settle any claim for money damages against the United States for injury or loss of property or personal injury or death caused by the negligent or wrongful act or omission of any employee of the agency while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred: *Provided*, That any award, compromise, or settlement in excess of $25,000 shall be effected only with the prior written approval of the Attorney General or his designee.

Subject to the provisions of this title relating to civil actions on tort claims against the United States, any such award,

compromise, settlement, or determination shall be final and conclusive on all officers of the Government, except when procured by means of fraud.

Any award, compromise, or settlement in an amount of $2,500 or less made pursuant to this section shall be paid by the head of the Federal agency concerned out of appropriations available to that agency. Payment of any award, compromise, or settlement in an amount in excess of $2,500 made pursuant to this section or made by the Attorney General in any amount pursuant to section 2677 of this title shall be paid in a manner similar to judgments and compromises in like causes and appropriations or funds available for the payment of such judgments and compromises are hereby made available for the payment of awards, compromises, or settlements under this chapter.

The acceptance by the claimant of any such award, compromise, or settlement shall be final and conclusive on the claimant, and shall constitute a complete release of any claim against the United States and against the employee of the government whose act or omission gave rise to the claim, by reason of the same subject matter.

28 U.S.C. § 2673. Repealed.

28 U.S.C. § 2674. Liability of United States

The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages.

If, however, in any case wherein death was caused, the law of the place where the act or omission complained of occurred provides, or has been construed to provide, for damages only punitive in nature, the United States shall be liable for actual or compensatory damages, measured by the pecuniary injuries resulting from such death to the persons respectively, for whose benefit the action was brought, in lieu thereof.

28 U.S.C. § 2675. Disposition by federal agency as prerequisite; evidence

(a) An action shall not be instituted upon a claim against the United States for money damages for injury or loss of property or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, unless the claimant shall have first presented the claim to the appropriate Federal agency and his claim shall have been finally denied by the agency in writing and sent by certified or registered mail. The failure of an agency to make final disposition of a claim within six months after it is filed shall, at the option of the claimant any time thereafter, be deemed a final denial of the claim for purposes of this section. The provisions of this subsection shall not apply to such claims as may be asserted under the Federal Rules of Civil Procedure by third party complaint, cross-claim, or counterclaim.

(b) Action under this section shall not be instituted for any sum in excess of the amount of the claim presented to the federal agency, except where the increased amount is based upon newly discovered evidence not reasonably discoverable at the time of presenting the claim to the federal agency, or upon allegation and proof of intervening facts, relating to the amount of the claim.

(c) Disposition of any claim by the Attorney General or other head of a federal agency shall not be competent evidence of liability or amount of damages.

28 U.S.C. § 2676. Judgment as bar

The judgment in an action under section 1346 (b) of this title shall constitute a complete bar to any action by the claimant, by reason of the same subject matter, against the employee of the government whose act or omission gave rise to the claim.

28 U.S.C. § 2677. Compromise

The Attorney General or his designee may arbitrate, compromise, or settle any claim cognizable under section 1346(b) of this title, after the commencement of an action thereon.

28 U.S.C. § 2678. Attorney fees; penalty

No attorney shall charge, demand, receive, or collect for services rendered, fees in excess of 25 per centum of any judgment rendered pursuant to section 1346(b) of this title or any settlement made pursuant to section 2677 of this title, or in excess of 20 per centum of any award, compromise, or settlement made pursuant to section 2672 of this title.

Any attorney who charges, demands, receives, or collects for services rendered in connection with such claim any amount in excess of that allowed under this section, if recovery be had, shall be fined not more than $2,000 or imprisoned not more than one year, or both.

28 U.S.C. § 2679. Exclusiveness of remedy

(a) The authority of any federal agency to sue and be sued in its own name shall not be construed to authorize suits against such federal agency on claims which are cognizable under section 1346(b) of this title, and the remedies provided by this title in such cases shall be exclusive.

(b) The remedy against the United States provided by sections 1346(b) and 2672 of this title for injury or loss of property or personal injury or death, resulting from the operation by any employee of the Government of any motor vehicle while acting within the scope of his office or employment, shall hereafter be exclusive of any other civil action or proceeding by reason of the same subject matter against the employee or his estate whose act or omission gave rise to the claim.

(c) The Attorney General shall defend any civil action or proceeding brought in any court against any employee of the Government or his estate for any such damage or injury. The employee against whom such civil action or proceeding is brought shall deliver within such time after date of service or knowledge of service as determined by the Attorney General, all process served upon him or an attested true copy thereof to his immediate superior or to whomever was designated by the head of his department to receive such papers and such person shall promptly furnish copies of the pleadings and process therein to the United States attorney for the district embracing the place wherein the proceeding is brought, to the Attorney General, and to the head of his employing Federal agency.

(d) Upon a certification by the Attorney General that the defendant employee was acting within the scope of his employment at the time of the incident out of which the suit arose, any such civil action or proceeding commenced in a State court shall be removed without bond at any time before trial by the Attorney General to the district court of the United States for the district and division embracing the place wherein it is pending and the proceedings deemed a tort action brought against the United States under the provisions of this title and all references thereto. Should a United States district court determine on a hearing on a motion to remand held before a trial on the merits that the case so removed is one in which a remedy by suit within the meaning of subsection (b) of this section is not available against the United States, the case shall be remanded to the State court.

(e) The Attorney General may compromise or settle any claim asserted in such civil action or proceeding in the manner provided in section 2677, and with the same effect.

28 U.S.C. § 2680. Exceptions

The provisions of this chapter and section 1346(b) of this title shall not apply to—

(a) Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

(b) Any claim arising out of the loss, miscarriage, or negligent transmission of letters or postal matter.

(c) Any claim arising in respect of the assessment or collection of any tax or customs duty, or the detention of any goods or merchandise by any officer of customs or excise or any other law-enforcement officer.

(d) Any claim for which a remedy is provided by sections 741-752, 781-790 of Title 46, relating to claims or suits in admiralty against the United States.

(e) Any claim arising out of an act or omission of any employee of the Government in administering the provisions of sections 1-31 of Title 50, Appendix.

(f) Any claim for damages caused by the imposition or establishment of a quarantine by the United States.

(g) Repealed. Sept. 26, 1950, c. 1049, § 13(5), 64 Stat. 1043.

(h) Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights: *Provided*, That, with regard to acts or omissions of investigative or law enforcement

officers of the United States Government, the provisions of this chapter and section 1346(b) of this title shall apply to any claim arising, on or after the date of the enactment of this proviso, out of assault, battery, false imprisonment, false arrest, abuse of process, or malicious prosecution. For the purpose of this subsection, "investigative or law enforcement officer" means any officer of the United States who is empowered by law to execute searches, to seize evidence, or to make arrests for violations of Federal Law.

(i) Any claim for damages caused by the fiscal operations of the Treasury or by the regulation of the monetary system.

(j) Any claim arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war.

(k) Any claim arising in a foreign country.

(l) Any claim arising from the activities of the Tennessee Valley Authority.

(m) Any claim arising from the activities of the Panama Canal Company.

(n) Any claim arising from the activities of a Federal land bank, a Federal intermediate credit bank, or a bank for cooperatives.

49 U.S.C. 1301

§ 1301. Definitions

As used in this chapter, unless the context otherwise requires--

(1) "Administrator" means the Administrator of the Federal Aviation Administration.

(2) "Aeronautics" means the science and art of flight.

(3) "Air carrier" means any citizen of the United States who undertakes, whether directly or indirectly or by a lease or any other arrangement, to engage in air transportation: *Provided*, That the Board may by order relieve air carriers who are not directly engaged in the operation of aircraft in air transportation from the provisions of this chapter to the extent and for such periods as may be in the public interest.

(4) "Air commerce" means interstate, overseas, or foreign air commerce or the transportation of mail by aircraft or any operation or navigation of aircraft within the limits of any Federal airway or any operation or navigation of aircraft which directly affects, or which may endanger safety in, interstate, overseas, or foreign air commerce.

(5) "Aircraft" means any contrivance now known or hereafter invented, used, or designed for navigation of or flight in the air.

(6) "Aircraft engine" means an engine used, or intended to be used, for propulsion of aircraft and includes all parts, appurtenances, and accessories thereof other than propellers.

(7) "Airman" means any individual who engages, as the person in command or as pilot, mechanic, or member of the crew, in the navigation of aircraft while under way; and (except to the extent the Secretary of Transportation may otherwise provide with respect to individuals employed outside the United States) any individual who is directly in charge of the inspection, maintenance, overhauling, or repair of aircraft, aircraft engines, propellers, or appliances; and any individual who serves in the capacity of aircraft dispatcher or air-traffic control-tower operator.

(8) "Air navigation facility" means any facility used in, available for use in, or designed for use in, aid of air navigation, including landing areas, lights, any apparatus or equipment for disseminating weather information, for signaling, for radio-directional finding, or for radio or other electrical communication, and any other structure or mechanism having a similar purpose for guiding or controlling flight in the air or the landing and take-off of aircraft.

(9) "Airport" means a landing area used regularly by aircraft for receiving or discharging passengers or cargo.

(10) "Air transportation" means interstate, overseas, or foreign air transportation or the transportation of mail by aircraft.

(11) "All-cargo air service" means—

(A) the carriage by aircraft of only (i) property as a common carrier for compensation or hire, or (ii) mail, or both, in commerce between a place in any State of the United States, or the District of Columbia, and a place in any other State of the United States, or the District of Columbia; or between places in the same State of the United States through the airspace over any place outside thereof; or between places in the same territory or possession of the United States, or the District of Columbia;

(B) the carriage by aircraft of only (i) property as a common carrier for compensation or hire, or (ii) mail, or both, in commerce between a place in any State of the United States or the District of Columbia and any place in the Commonwealth of Puerto Rico or the Virgin Islands or between a place in the Commonwealth of Puerto Rico and a place in the Virgin Islands;

whether such commerce moves wholly by aircraft or partly by aircraft and partly by other forms of transportation.

(12) "Appliances" means instruments, equipment, apparatus, parts, appurtenances, or accessories, of whatever description, which are used, or are capable of being or intended to be used, in the navigation, operation, or control of aircraft in flight (including parachutes and including communication equipment and any other mechanism or mechanisms installed in or attached to aircraft during flight), and which are not a part or parts of aircraft, aircraft engines, or propellers.

(13) "Board" means the Civil Aeronautics Board.

(14) "Charter air carrier" means an air carrier holding a certificate of public convenience and necessity authorizing it to engage in charter air transportation.

(15) "Charter air transportation" means charter trips, including inclusive tour charter trips, in air transportation, rendered pursuant to authority conferred under this chapter under regulations prescribed by the Board.

(16) "Citizen of the United States" means (a) an individual who is a citizen of the United States or of one of its possessions, or (b) a partnership of which each member is such an individual, or (c) a corporation or association created or organized under the laws of the United States or of any State, Territory, or possession of the United States, of which the president and two-thirds or more of the board of directors and other managing officers thereof are such individuals and in which at least 75 per centum of the voting interest is owned or controlled by persons who are citizens of the United States or of one of its possessions.

(17) "Civil aircraft" means any aircraft other than a public aircraft.

(18) "Civil aircraft of the United States" means any aircraft registered as provided in this chapter.

(19) "Conditional sale" means (a) any contract for the sale of an aircraft, aircraft engine, propeller, appliance, or spare part under which possession is delivered to the buyer and the property is to vest in the buyer at a subsequent time, upon the payment of part or all of the price, or upon the performance of any other condition or the happening of any contingency; or (b) any contract for the bailment or leasing of an aircraft, aircraft engine, propeller, appliance, or spare part, by which the bailee or lessee contracts to pay as compensation a sum substantially equivalent to the value thereof, and by which it is agreed that the bailee or lessee is bound to become, or has the option of becoming, the owner thereof upon full compliance with the terms of the contract. The buyer, bailee, or lessee shall be deemed to be the person by whom any such contract is made or given.

(20) "Conveyance" means a bill of sale, contract of conditional sale, mortgage, assignment of mortgage, or other instrument affecting title to, or interest in, property.

(21) "Federal airway" means a portion of the navigable airspace of the United States designated by the Secretary of Transportation as a Federal airway.

(22) "Foreign air carrier" means any person, not a citizen of the United States, who undertakes, whether directly or indirectly or by lease or any other arrangement, to engage in foreign air transportation.

(23) "Interstate air commerce", "overseas air commerce", and "foreign air commerce", respectively, mean the carriage by aircraft of persons or property for compensation or hire, or the carriage of mail by aircraft, or the operation or navigation of aircraft in the conduct or furtherance of a business or vocation, in commerce between, respectively—

(a) a place in any State of the United States, or the District of Columbia, and a place in any other State of the United States, or the District of Columbia; or between places in the same State of the United States through the airspace over any place outside thereof; or between places in the same Territory or possession of the United States, or the District of Columbia;

(b) a place in any State of the United States, or the District of Columbia, and any place in a Territory or possession of the United States; or between a place in a Territory or possession of the United States, and a place in any other Territory or possession of the United States; and

(c) a place in the United States and any place outside thereof;

whether such commerce moves wholly by aircraft or partly by aircraft and partly by other forms of transportation.

(24) "Interstate air transportation", "overseas air transportation", and "foreign air transportation", respectively, mean the carriage by aircraft of persons or property as a common carrier for compensation or hire or the carriage of mail by aircraft, in commerce between, respectively—

(a) a place in any State of the United States, or the District of Columbia, and a place in any other State of the United States, or the District of Columbia; or between places in the same State of the United States through the airspace over any place outside thereof; or between places in the same Territory or possession of the United States, or the District of Columbia;

(b) a place in any State of the United States, or the District of Columbia, and any place in a Territory or possession of the United States; or between a place in a Territory or possession of the United States, and a place in any other Territory or possession of the United States; and

(c) a place in the United States and any place outside thereof;

whether such commerce moves wholly by aircraft or partly by aircraft and partly by other forms of transportation.

(25) "Intrastate air carrier" means any citizen of the United States who undertakes, whether directly or indirectly or by a lease or any other arrangement, to engage solely in intrastate air transportation.

(26) "Intrastate air transportation" means the carriage of persons or property as a common carrier for compensation or hire, by turbo-jet-powered aircraft capable of carrying thirty or more persons, wholly within the same State of the United States.

(27) "Landing area" means any locality, either of land or water, including airports and intermediate landing fields, which is used, or intended to be used, for the landing and take-off of aircraft, whether or not facilities are provided for the shelter, servicing, or repair of aircraft, or for receiving or discharging passengers or cargo.

(28) "Mail" means United States mail and foreign-transit mail.

(29) "Navigable airspace" means airspace above the minimum altitudes of flight prescribed by regulations issued under this chapter, and shall include airspace needed to insure safety in take-off and landing of aircraft.

(30) "Navigation of aircraft" or "navigate aircraft" includes the piloting of aircraft.

(31) "Operation of aircraft" or "operate aircraft" means the use of aircraft, for the purpose of air navigation and includes the navigation of aircraft. Any person who causes or authorizes the operation of aircraft, whether with or without the right of legal control (in the capacity of owner, lessee, or otherwise) of the aircraft, shall be deemed to be engaged in the operation of aircraft within the meaning of this chapter.

(32) "Person" means any individual, firm, copartnership, corporation, company, association, joint-stock association, or body politic; and includes any trustee, receiver, assignee, or other similar representative thereof.

(33) "Propeller" includes all parts, appurtenances, and accessories thereof.

(34) "Possessions of the United States" means (a) the Canal Zone, but nothing herein shall impair or affect the jurisdiction which has heretofore been, or may hereafter be, granted to the President in respect of air navigation in the Canal Zone; and (b) all other possessions of the United States. Where not otherwise distinctly expressed or manifestly incompatible with the intent thereof, references in this chapter to possessions of the United States shall be treated as also referring to the Commonwealth of Puerto Rico.

(35) "Predatory" means any practice which would constitute a violation of the antitrust laws as set forth in section 12 of Title 15.

(36) "Public aircraft" means an aircraft used exclusively in the service of any government or of any political subdivision thereof, including the government of any State, Territory, or possession of the United States, or the District of Columbia, but not including any government-owned aircraft engaged in carrying persons or property for commercial purposes.

(37) "Spare parts" means parts, appurtenances, and accessories of aircraft (other than aircraft engines and propellers), of aircraft engines (other than propellers), of propellers and of appliances, maintained for installation or use in an aircraft, aircraft engine, propeller, or appliance, but which at the time are not installed therein or attached thereto.

(38) The term "special aircraft jurisdiction of the United States" includes—

(a) civil aircraft of the United States;

(b) aircraft of the national defense forces of the United States;

(c) any other aircraft within the United States;

(d) any other aircraft outside the United States—

(i) that has its next scheduled destination or last point of departure in the United States, if that aircraft next actually lands in the United States; or

(ii) having "an offense", as defined in the Convention for the Suppression of Unlawful Seizure of Aircraft, committed aboard, if that aircraft lands in the United States with the alleged offender still aboard; and

(e) other aircraft leased without crew to a lessee who has his principal place of business in the United States, or if none, who has his permanent residence in the United States;

while that aircraft is in flight, which is from the moment when all external doors are closed following embarkation until the moment when one such door is opened for disembarkation or in the case of a forced landing, until the competent authorities take over the responsibility for the aircraft and for the persons and property aboard.

(39) "State agency" means that department, agency, officer, or other entity of a State government which has been designated according to State law as—

(A) the recipient of any notice required under subchapter IV of this chapter to be given to a State agency; or

(B) the representative of the State in any matter about which the Board is required, under such subchapter IV of this chapter, to consult with or consider the views of a State agency.

(40) "Ticket agent" means any person, not an air carrier or a foreign air carrier and not a bona fide employee of an air carrier or foreign air carrier, who, as principal or agent, sells or offers for sale any air transportation, or negotiates for, or holds himself out by solicitation, advertisement, or otherwise as one who sells, provides, furnishes, contracts or arranges for, such transportation.

(41) "United States" means the several States, the District of Columbia, and the several Territories and possessions of the United States, including the territorial waters and the overlying airspace thereof.

As amended Pub.L. 95-163, § 17(b), Nov. 9, 1977, 91 Stat. 1286; Pub.L. 95-504, § 2, Oct. 24, 1978, 92 Stat. 1705.

1978 Amendment. Pars. (14), (15). Pub.L. 95-504, § 2(a)(1), added pars. (14) and (15). Former pars. (14) and (15) renumbered (16) and (17) respectively.

Pars. (16), (17). Pub.L. 95-504, § 2(b), renumbered former pars. (14) and (15) as (16) and (17), respectively. Former pars. (16) and (17) renumbered (18) and (19), respectively.

Pars. (18) to (32). Pub.L. 95-504, § 2(b), renumbered former pars. (16) to (30) as (18) to (32).

Par. (33). Pub.L. 95-504, § 2(b), renumbered former par. (31) as (33). Former par. (33) renumbered (36). Provision enacted by section 2(a)(2) of Pub. L. 95-504 as par. (33) renumbered (35).

49 U.S.C., 1303

§ 1303. Consideration of matters in public interest by Secretary of Transportation

In the exercise and performance of his powers and duties under this chapter the Secretary of Transportation shall consider the following, among other things, as being in the public interest:

(a) The regulation of air commerce in such manner as to best promote its development and safety and fulfill the requirements of national defense;

(b) The promotion, encouragement, and development of civil aeronautics;

(c) The control of the use of the navigable airspace of the United States and the regulation of both civil and military operations in such airspace in the interest of the safety and efficiency of both;

(d) The consolidation of research and development with respect to air navigation facilities, as well as the installation and operation thereof;

(e) The development and operation of a common system of air traffic control and navigation for both military and civil aircraft.

Pub.L. 85-726, Title I, § 103, Aug. 23, 1958, 72 Stat. 740.

TITLE 49 U.S.C. 1343

§ 1343. General powers and duties of Administrator

Military participation; detail of members of Armed Forces

(a) (1) In order to insure that the interests of national defense are properly safeguarded and that the Administrator is properly advised as to the needs and special problems of the armed services, the Administrator shall provide for participation of military personnel in carrying out his functions relating to regulation and protection of air traffic, including provision of air navigation facilities, and research and development with respect thereto, and the allocation of airspace. Members of the Army, the Navy, the Air Force, the Marine Corps, or the Coast Guard may be detailed by the appropriate Secretary, pursuant to cooperative agreements with the Administrator, including such agreement on reimbursement as may be deemed advisable by the Administrator and the Secretary concerned, for service in the Administration to effect such participation.

(2) Appointment to, acceptance of, and service as Deputy Administrator or under such cooperative agreements shall in no way affect status, office, rank, or grade which commissioned officers or enlisted men may occupy or hold, or any emolument, perquisite, right, privilege, or benefit incident to or arising out of any such status, office, rank, or grade. No person so detailed or appointed shall be subject to direction by or control by the department from which detailed or appointed or by any agency or officer thereof directly or indirectly with respect to his responsibilities under this chapter or within the Administration.

Exchange of information

(b) In order to assist the Administrator further in the discharge of responsibilities under this chapter, the Administrator and the Secretary of Defense, and the Administrator and the Administrator of the National Aeronautics and Space Administration, are directed to establish by cooperative agreement suitable arrangements for the timely exchange of information pertaining to their programs, policies, and requirements directly relating to such responsibilities.

(c) The Administrator shall develop, in consultation with the Department of Defense and other affected Government agencies, plans for the effective discharge of the responsibilities of the Administration in the event of war, and shall propose to Congress on or before January 1, 1960, legislation for such purpose: *Provided*, That in the event of war the President by Executive order may transfer to the Department of Defense any functions (including powers, duties, activities, facilities, and parts of functions) of the Administration prior to enactment of such proposed legislation. In connection with any such transfer, the President may provide for appropriate transfers of records, property, and personnel.

(TITLE 49 U.S.C. 1343 continued)

Officers and employees

(d) The Administrator is authorized, subject to the civil service and classification laws, to select, employ, appoint, and fix the compensation of such officers, employees, attorneys, and agents as shall be necessary to carry out the provisions of this chapter, and to define their authority and duties, except that the Administrator may fix the compensation for not more than twenty-three positions at rates not to exceed the highest rate of grade 18 of the General Schedule

(e) Omitted.

Scientific or professional personnel

(f) The Administrator is authorized to establish and fix the compensation for not to exceed twenty positions of officers and employees of the Administration of a scientific or professional nature without regard to chapter 51 and subchapter III of chapter 53 of Title 5, each such position being established to effectuate those research, development, and related activities of the Administration which require the services of specially qualified scientific or professional personnel The rates of basic compensation for positions established pursuant to this subsection shall not exceed the maximum rate payable under sections 1161 to 1163 of Title 5, and Title V of the Act of July 31, 1956 (Public Law 854, Eighty-fourth Congress), and shall be subject to the approval of the Civil Service Commission. Positions created pursuant to this subsection shall be included in the classified civil service of the United States, but appointment to such positions shall be made without competitive examination upon approval of the proposed appointee's qualifications by the Civil Service Commission or such officers or agents as it may designate for this purpose.

Advisory committees and consultants

(g) The Administrator is authorized to appoint such advisory committees as shall be appropriate for the purpose of consultation with and advice to the Administration in performance of its functions hereunder and to obtain services authorized by section 55a of Title 5, at rates not to exceed $100 per diem for individuals, and for not to exceed one hundred days in any calendar year in the case of any individual. Members of such committees shall be entitled to travel expenses and per diem as authorized by the Administrative Expenses Act of 1946, for all persons employed intermittently as consultants or experts receiving compensation on a per diem basis.

(h) Repealed. Pub.L. 87-367, Title I, § 103(2), Oct. 4, 1961, 75 Stat. 787.

(TITLE 40 U.S.C. 1343 continued)

Cooperation with other agencies

(i) The Administrator is authorized to use with their consent the available services, equipment, personnel, and facilities of other civilian or military agencies and instrumentalities of the Federal Government, on a reimbursable basis when appropriate, and on a similar basis to cooperate with such other agencies and instrumentalities in the establishment and use of services, equipment, and facilities of the Administration. The Administrator is further authorized to confer with and avail himself of the cooperation, services, records, and facilities of State, Territorial, municipal or other local agencies.

Pub.L. 85-726, Title III, § 302(c)-(k), Aug. 23, 1958, 72 Stat. 745; Pub.L. 87-367, Title I, § 103(2), Title II, § 205, Oct. 4, 1961, 75 Stat. 787, 791; Pub.L. 87-793, § 1001(b), Oct. 11, 1962, 76 Stat. 864; Pub. L. 93-608, § 1(20), Jan. 2, 1975, 88 Stat. 1970.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

WILMA CHARLENE RILEY, Administratrix of the Estate of Edward A. Riley, deceased, et al,	)	
Plaintiffs,	)	
vs.	)	NO. IP 78-636-C
DEPARTMENT OF TRANSPORTATION, FEDERAL AVIATION ADMINISTRATION, and THE UNITED STATES OF AMERICA,	)	
Defendants.	)	

ENTRY

This matter comes before the Court upon the motion of defendants United States of America, Department of Transportation and Federal Aviation Administration to dismiss Plaintiffs complaint for failure to state a cause of action upon which relief can be granted. The Court, being duly advised in the premises, now submits its ruling.

This action was commenced with the filing of Plaintiffs' complaint on October 2, 1978 under the Federal Torts Claims Act, 28 U.S.C. Subsections 2671 et seq., for the wrongful death of Edward Riley caused by the crash of a United States Air Force plane which Riley was piloting. On January 4, 1979, Defendants moved to dismiss this action upon the ground, among others, that the Tort Claims Act does not apply to injuries sustained during the course of military service. On February 15, 1979, Plaintiffs filed an amended complaint, which conforms their pleading to the argument which they assert in their February 20, 1979 brief in opposition to the defendants' motion. The defendants' motion to dismiss is deemed refiled as to the amended complaint, and the Court now GRANTS said motion.

The plaintiffs' argument in opposition to Defendants' motion to dismiss places great reliance upon the case of Brooks v. United States,

337 U.S. 49, 69 S.Ct. 918, 93 L.Ed. 1200 (1949). However, Brooks was fully considered and distinguished in Feres v. United States, 340 U.S. 135, 71 S.Ct. 153 (1950). In Feres, the Court stated:

> "* * * *The injury to Brooks did not arise out of or in the course of military duty. Brooks was on furlough, driving along the highway, under compulsion of no orders or duty and on no military mission. * * *We conclude that the Government is not liable under the Federal Tort Claims Act for injuries to servicemen where the injuries arise out of or are in the course of activity incident to service.* * * *"

This action is ORDERED dismissed.

Date: 20 March 1979

/s/
Cale J. Holder, Judge
United States District Court
Southern District of Indiana

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604
Argued November 6, 1979
January 17, 1980.
Before
Hon. Walter J. Cummings, Circuit Judge
Hon. Robert A. Sprecher, Circuit Judge
Hon. Edward Dumbauld, Senior District Judge*

No. 79-1393

WILMA CHARLENE RILEY, et al., Plaintiffs-Appellants, vs. DEPARTMENT OF TRANSPORTATION, FEDERAL AVIATION ADMINISTRATION, and UNITED STATES OF AMERICA, Defendants-Appellees.	Appeal from the United States District Court for the Southern District of Indiana, Indianapolis Div. No. IP 78-636-C Cale J. Holder, Judge

O R D E R

Wilma Riley, the principal plaintiff in this action, [1]/ is the widow of Edward A. Riley and administratrix of his estate. On February 14, 1977, Edward Riley, while a captain in the United States Air Force, was engaged in a military mission when the plane he was piloting crashed into a mountain 175 miles

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*The Honorable Edward Dumbauld, Senior District Judge of the Western District of Pennsylvania, is sitting by designation.

[1]/The other plaintiffs are the four daughters of Wilma and Edward Riley.

northwest of Pope Air Force Base, North Carolina. Captain Riley was killed in the crash. On March 6, 1978, pursuant to the Federal Tort Claims Act (FTCA),[2/] Wilma Riley filed an administrative claim for wrongful death with defendants Federal Aviation Administration (FAA) and the Department of Transportation (DOT). Alleging that the negligence of FAA air controllers caused the crash, she sought $4,000,000 in damages for the death of her husband. The FAA denied the claim on April 3, 1978.

Thereafter the administratrix filed a complaint in district court seeking $4,000,000 in damages from the United States, the DOT and the FAA under the FTCA (28 U.S.C. {{ 1346(b) and 2671). The complaint was based on the FAA's negligence in controlling the civilian airway being traversed by her husband at the time of his death. In an amended complaint, she alleged that her husband's death was the result of the intentional misconduct and willful neglect of FAA air controllers. On March 20, 1979, the district court granted the defendants' motion to dismiss the amended complaint, citing the Supreme Court rule in Feres v. United States, 340 U.S. 135, 146, "that the Government is not liable under the Federal Tort Claims Act for injuries to servicemen where the of activity incident to service." Plaintiff appealed and we affirm.

2/28 U.S.C. { 2675(a) requires that before suing the United States for damages for death caused by negligence, the claimant must first present his claim to appropriate federal agency.

This case requires us to decide whether the FTCA permits a suit to recover damages for the death of an active member of the military engaged in a military mission when that death is the result of the negligence of civilian personnel of the Government. In the court below, plaintiffs rested their claim for recovery on Brooks v. United States, 337 U.S. 49, and here cite as well Indian Towing Co. v. United States, 350 U.S. 61. Neither controls the issues in this case. In Indian Towing, the Supreme Court found the Government liable under the FTCA when the negligence of the Coast Guard in the operation of a lighthouse resulted in the grounding of the tug NAVAJO and damage to the cargo of its tow. The plaintiff, which was the owner of the tug, was not associated with the military and no military personnel were injured in the accident. In Brooks, meanwhile, the Supreme Court, over the dissents of Justices Frankfurter and Douglas, allowed plaintiffs to recover for injuries sustained when their car was struck by a United States Army truck driven by a civilian employee of the Army. Brooks differed from Indian Towing in that the two plaintiffs in Brooks were members of the armed forces, but at the time of the accident they were on leave, driving with their father, and thus their injuries were "not incident to their service." 337 U.S. at 50. The Court left open the question whether there would be liability if the accident had been incident to the plaintiff's military obligations. 337 U.S. at 52.

The Court answered this latter question in Feres v. United States, 340 U.S. 135, which, as Judge Holder recognized, governs this case. In

Feres, a unanimous Supreme Court held that the Government was not liable when a serviceman on active duty died in a fire as a result of the negligence of the Army in quartering him in barracks with a defective heating plant. Speaking for the Court, Justice Jackson emphasized the provision in the FTCA providing that the United States shall be liable for torts "in the same manner and to the same extent as a private individual under like circumstances ***." 28 U.S.C. { 2674. As he stated, plaintiffs could "point to no liability of a 'private individual' even remotely analogous to that which they are asserting against the United States," adding that no American law has ever permitted a soldier to recover for the negligence of his Government. 340 U.S. at 141. In reaching this result, the Court was also influenced by Congressional enactments providing compensation for injuries to or the death of those in the Armed Services, and noted that recovery under those provisions compared favorably with most workmen's compensation statutes. Justice Jackson also expressed concern that application of the FTCA in Feres would subject issues that are unequivocally federal in character to widely differing state laws. For all these reasons, the Court in Feres concluded that "the Government is not liable under the Federal Tort Claims Act for injuries to servicemen where the injuries arise out of or are in the course of activity incident to service." 340 U.S. at 146.

Since Captain Riley died while "in the course of activity incident to service" and his survivors are admittedly receiving compensation

for his death, [3] the full force of the Feres principle applies and recovery is therefore inappropriate. We are of course aware that some courts in different circumstances have attempted to distinguish Feres. See Note, "From Feres to Stencel: Should Military Personnel Have Access to FTCA Recovery?" 77 Mich.L.Rev. 1099, 1100 n. 7 (1979).[4] But it is far more significant that the Supreme Court has recently upheld the validity of the basic rule in Stencel Aero Engineering Corp. v. United States, 431 U.S. 666.[5] In Stencel, the Court reaffirmed the viability of the policies noted in Feres, supplementing them with the observation that any other approach could have a deleterious effect on military discipline.

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[3] The amount of compensation does not appear in the record, and at oral argument the administratrix's counsel surprisingly was unable to state how much is now being received.

[4] This Note acknowledges that the courts now apply Feres whenever the plaintiff has a military status but recommends that the Supreme Court or Congress abolish the Feres rule. 77 Mich.L.Rev. at 1125-1126.

[5] In Stencel a National Guard officer was permanently injured when the egress life-support system of his fighter aircraft malfunctioned during a mid-air emergency while he was on a training flight. With two Justices dissenting, the Court held that since the officer could not recover under the FTCA against the Government for injuries sustained incident to his military service, Feres protected the United States from Stencel's cross-claim charging that any malfunction in the support system was the result of the Government's active negligence.

Plaintiffs nevertheless argue that Feres and Stencel are inapplicable because the tortfeasors in this case were civilian air traffic controllers and thus that the acts in question were "not acts incident to the military activity as defined within the perimeters of the Feres decision" (Br. 12). This purported distinction reflects a misunderstanding of the Feres rule. As noted above, Justice Jackson's reasoning in Feres depended heavily on the absence for FTCA purposes of a private individual with potential liability analogous to that asserted against the United States, a reference less to the status of the defendant than to the unique situation of a soldier. In addition, the policies enunciated in Stencel all focus on the status of the person bringing the suit. Further, the only material difference between Brooks and Feres is that in Feres the plaintiff was in the course of activity incident to service while in Brooks the plaintiffs were not. Thus, although not entirely dispositive, the Supreme Court cases strongly suggest that it is the status of the injured rather than that of the tortfeasor that underlies the Feres rule and determines whether a suit may lie.

Plaintiffs cannot moreover rely on Indian Towing to extend the Brooks result to cover any case in which either the injured or the tortfeasor is a civilian. The Court in Indian Towing did permit plaintiff to sue a governmental authority performing what were asserted to be distinctly governmental tasks, but that case involved a civilian plaintiff and a Coast Guard tortfeasor and is thus for present purposes the

same as Brooks./6 This Court meanwhile has elsewhere rejected plaintiff's proposed expansion of the Brooks result. In Layne v. United States, 295 F.2d 433 (1961), certiorari denied, 368 U.S. 990,7/ the decedent, a military officer on a military mission, was fatally injured through the negligence of civilian employees of the United States at the Terre Haute, Indiana, airport. Although the alleged tortfeasors were civilians, we held that the Feres rule precluded recovery. Similarly, in a case decided just last summer, the Ninth Circuit applied Feres in Uptegrove v. United States, 600 F.2d 1248, in which a naval lieutenant was killed in an Air Force transport through the alleged negligence of two FAA air traffic controllers.8/ Significantly, the Feres/-Stencel policies regarding the availability of compensation, the need for the application of uniform federal law, and the requirements of military discipline plainly support the results in Layne and Uptegrove.

6/Indian Towing is even more distinguishable than Brooks because the plaintiff in Indian Towing was not associated with the military.

7/We recently cited Layne as good authority in Herreman v. United States, 476 F.2d 234, 236 (7th Cir. 1973).

8/To like effect is United States v. Lee, 400 F.2d 558 (9th Cir. 1968), certiorari denied, 393 U.S. 1053. As noted in Lee, 400 F.2d at 562, Sheppard v. United States, 369 F.2d 272 (3d Cir. 1966), certiorari denied, 386 U.S. 982, also rejected claims of representatives of servicemen against civilian tortfeasors, though that issue does not expressly appear in the brief per curiam opinion of the Third Circuit.

Plaintiffs also argue that their allegation that the tort was intentional should alter the outcome of this case. We disagree. Since it is the status of the injured rather than that of the tortfeasor that matters, it is difficult to understand how the intentional or non-intentional character of the tort is relevant. No such consideration played a role in Feres, and, given the policies discussed in that case and Stencel, the courts have refused to confine the Feres rule to negligent torts. Citizens National Bank of Waukegan v. United States, 594 F.2d 1154, 1157 and cases cited in n. 8 (7th Cir. 1979). Since those policies also operate here, we see no reason to carve out an exception for cases involving civilian tortfeasors acting intentionally and therefore adhere to our Citizens National Bank of Waukegan opinion.

Judgment affirmed.

DUMBAULD, Senior District Judge, concurring.

It seems clear to me that the Government is liable under the Federal Tort Claims Act, 28 U.S.C. 2674[1] for death caused by negligence of civilian FAA air traffic controllers whether the pilot navigating the aircraft negligently superintended by the civilian agency was a captain in the United States Air Force flying on a military mission, as in the case at bar, or an employee of United Airlines on a regularly scheduled flight, or the pilot of a chartered

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[1] "The United States shall be liable . . . in the same manner and to the same extent as a private individual under like circumstances."

commercial jet, or an amateur aviator on a pleasure jaunt in his Piper Cub.

In each instance the pilot was under the exclusive control[2] of the negligent civilian agency with respect to whose activities the Federal Tort Claims Act abolished the doctrine of sovereign immunity.

The military or civilian status of the

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[2]The civilian control of the FAA was exclusive with respect to the operational activities the negligent superintendence of which caused the disaster. That Captain Riley was under military command with respect to the mission on which his orders required him to engage in a flight controlled by the negligent civilian agency is immaterial.

injured plaintiff[3] is irrelevant to the issue of liability under the Federal Tort Claims Act under these circumstances.

It is true that the relationship between sovereign and soldier is unique, with no equivalent in private life; hence the analogy to tort liability of a private individual embodied in the Federal Tort Claims Act[4] is inapplicable in cases where an injured member of the armed forces complains of negligence on the part of

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[3]Technically, the plaintiff here is not the pilot himself but the widow of Captain Riley, and the legal injury sustained is his wrongful death caused by negligence of the civilian government agency. (It is proper to assume that the alleged negligence can be proved, since the District Court dismissed the action on a motion equivalent to common law demurrer.)

[4]See note 1, supra.

military authorities. Feres v. U.S., 340 U.S. 135, 141 (1950):[5] Stencel Corp. v. U.S., 431 U.S. 666, 670 (2977).

But in the case at bar there is no attempt to recover for negligence on the part of the military authorities. The unique military relationship recognized in Feres is not involved. The alleged negligence is on the part of civilian employees for whose conduct the Government is concededly liable under the Federal Tort Claims Act in cases brought by civilian plaintiffs.

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[5]There a soldier was burned to death in a military barracks alleged to be unsafe because of a defective heating plant. In companion cases negligence of army surgeons was alleged.

It seems clear to me that the status of the tortfeasor, not that of the plaintiff, is controlling with respect to liability under the Federal Tort Claims Act. I disagree with the contrary conclusion reached by the Ninth Circuit in Uptegrove v. U.S., 600 F.2d 1248, 1249 (C.A. 9, 1979). However, this Circuit has accepted the same result in Layne v. U.S., 295 F.2d 433 (C. A. 7, 1961), and I am therefore bound by stare decisis to concur, although if the matter were res integra I should dissent. In my judgment the question is open insofar as decisions of the Supreme Court are concerned.